STATE OF CALIFORNIA

OFFICE OF ADMINISTRATIVE LAW

Request for Regulatory Determination filed by the WADHAM ENERGY COMPANY, INC., regarding the CALIFORNIA DEPARTMENT OF TOXIC SUBSTANCES CONTROL'S classifying of rice hull ash containing silica as a hazardous waste under the Hazardous Waste Control Law[1]	**1996 OAL Determination No. 1** **[Docket No. 90-032]** **November 1, 1996** **Determination Pursuant to Government Code Section 11340.5; Title 1, California Code of Regulations, Chapter 1, Article 3**

Determination by: JOHN D. SMITH, Director

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SYNOPSIS

The Office of Administrative Law finds that the California Department of Toxic Substances Control did not violate the Administrative Procedure Act in 1990 when it classified rice hull ash containing silica as a hazardous waste.

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THE ISSUES PRESENTED[2]

The Office of Administrative Law ("OAL") has been asked to determine[3] whether, in classifying the Wadham Energy Company's rice hull ash containing silica as a hazardous waste pursuant to Health and Safety Code section 25117, the California Department of Toxic Substances Control ("Department"), formerly the Toxic Substances Control Program within the Department of Health Services, established a "regulation" required to be adopted pursuant to the Administrative Procedure Act ("APA").[4]

THE DECISION[5,6,7,8]

The Office of Administrative Law finds that:

(1) applicable law generally requires the Department to adopt its quasi-legislative enactments pursuant to the APA;

(2) at the time the Department classified Wadham's rice hull ash as hazardous, this departmental action ("the challenged rule") was a not a "regulation" within the meaning of the key provision of Government Code section 11342, subdivision (g);

(3) at the time the Department classified Wadham's rice hull ash as hazardous, the challenged rule did not violate Government Code section 11340.5, subdivision (a).[9]

(4) the record does not contain sufficient information for OAL to determine whether the requirements of Health and Safety Code section 25141.5 have been triggered.

REASONS FOR DECISION

I. THE APA AND REGULATORY DETERMINATIONS BY OAL

In *Grier v. Kizer*,[10] the California Court of Appeal described the APA and OAL's role in its enforcement as follows:

> "The APA was enacted to establish *basic minimum procedural requirements for* the adoption, amendment or repeal of *administrative regulations promulgated by the State's many administrative agencies*. (Stats. 1947, ch. 1425, secs. 1, 11, pp. 2985, 2988; former Gov. Code section 11420, see now sec. 11346.) Its provisions are applicable to the exercise of any quasi-legislative power conferred by statute (section 11346.) The APA requires an agency, inter alia, to give notice of the proposed adoption, amendment, or repeal of a regulation (section 11346.4), to issue a statement of the specific purpose of the proposed action (section 11346.2), and to afford interested persons the opportunity to present comments on the proposed action (section 11346.8). Unless the agency promulgates a regulation in substantial compliance with the APA, the regulation is *without legal effect*. (*Armistead v. State Personnel Board* (1978) 22 Cal.3d 198, 204, 149 Cal.Rptr. 1, 583 P.2d 744).
>
> "In 1979, the Legislature established the OAL and charged it with the orderly review of administrative regulations. In so doing, the Legislature cited an unprecedented growth in the number of administrative regulations being adopted by state agencies as well as the lack of a central office with the power and duty to review regulations to ensure they are written in a comprehensible manner, are authorized by statute and are consistent with other law. (Sections 11340, 11340.1, 11340.2)." (Footnote omitted; emphasis added.)[11]

In 1982, recognizing that state agencies were for various reasons bypassing OAL review (and other APA requirements), the Legislature enacted Government Code section 11340.5. That section, in broad terms, prohibits state agencies from issuing, utilizing, enforcing or attempting to enforce agency rules which should have been, but were not, adopted pursuant to the APA. The section also provides OAL with the authority to issue a regulatory determination as to whether a challenged state agency rule is a "regulation" as defined in subdivision (g) of Government Code section 11342. Subdivision (b) of section 11340.5 states as follows:

> "If [OAL] is notified of, or on its own, learns of the issuance, enforcement of, or use of, an agency guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule that has not been adopted as a regulation and filed with the Secretary of State pursuant to [the APA, OAL] may issue a determination *as to whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, is a regulation as defined in subdivision (g) of Section 11342."* (Emphasis added.)

These provisions thus authorize OAL to determine whether a challenged rule is or is not a "regulation" that must be adopted pursuant to the APA. Notably, the provisions do not authorize OAL to prevent the use of a rule or policy declared to be an invalid "regulation" in violation of section 11340.5, or to impose penalties upon such use. Such authority rests with the courts.

Effective January 1, 1995, Assembly Bill No. 2531 (Stats. 1994, c. 1039) substantially reorganized the APA. The reorganization is reflected in any Government Code sections cited in this determination. Cross reference tables listing old and new section numbers and article headings, as well as a list of section numbers that remain unchanged, are included with this determination as exhibits A, B and C.

II. THE RULEMAKING AGENCY INVOLVED HERE; ITS AUTHORITY; BACKGROUND OF THIS REQUEST FOR DETERMINATION

The Rulemaking Agency Named in this Proceeding

In 1972, California enacted the Hazardous Waste Control Law ("HWCL"), which was operative July 1, 1973.[12] The act provided that the State Department of Health[13] (now known as the "State Department of Health Services") oversee the hazardous waste control program, adopt minimum standards and regulations for the handling, processing, and disposal of hazardous and extremely hazardous wastes, as defined, to protect against hazards to public health, domestic livestock, and wildlife, and carry out specified enforcement procedures.[14]

Legislative findings and declarations added in 1982 suggest the scope of responsibilities of the state agency charged with administering the HWCL as follows:

> "The Legislature therefore declares that:
>
> "(a) In order to protect the public health and the environment and to conserve natural resources, it is in the public interest to establish regulations and incentives which ensure that the generators of hazardous waste employ technology and management practices for the safe handling, treatment, recycling, and destruction of their hazardous wastes prior to disposal."[15]

In 1991, the Governor's Reorganization Plan created the Department of Toxic Substances Control ("Department") and transferred responsibility for the HWCL, including hazardous waste management, from the Department of Health Services to the new department.[16]

Authority [17]

Health and Safety Code section 25141 requires that

> "(a) The department shall develop and adopt by regulation *criteria and guidelines* for the identification of hazardous wastes and extremely hazardous wastes."[18] (Emphasis added.)

The Department has done so. In 1984, the Department of Health Services adopted regulations under this authority, at section 66693 *et seq.*, Title 22 of the California Code of Regulations ("CCR"). In 1991, following the transfer of authority to the Department of Toxic Substances Control, the new Department adopted similar provisions at section 66261.1, *et seq.*, Title 22, CCR, as discussed in more detail below.

Health and Safety Code section 25140 has remained unchanged since 1972, when it mandated first the Department of Health, then the Department of Health Services, and now the Department of Toxic Substances Control to

> " . . . prepare, adopt and . . . revise when appropriate, a listing of the wastes which are determined to be hazardous . . . . "[19]

Health and Safety Code section 25142, as amended by Statutes of 1988 (c. 1631), and as it was in effect at the time of this request for determination, provides that

> "[a]ny waste which conforms to a criterion adopted pursuant to Section 25141 shall be managed in accordance with permits, orders, and regulations issued or adopted by the department pursuant to this chapter [ ] . . . or recycled consistent with the list of hazardous wastes which the department, pursuant to Section 25175, finds are economically and technologically feasible to recycle, until the waste is cited in a list adopted by the department pursuant to Section 25140."

Later Statutory Developments

In 1992--*after* Wadham Energy Company, Inc., the requester of this determination, had submitted its request for determination to OAL--the Legislature enacted section 25141.5 as follows:

> "The department shall, when classifying a waste as hazardous pursuant to the criteria in paragraph (8) of subdivision (a) of Section 66261.24 of Title 22 of the California Code of Regulations, as that section read on January 1, 1993, incorporate the department's decision into a regulation, if the department determines that the waste's classification as a hazardous waste is likely to have broad application beyond the producer who initiated the request."[20]

In December 1991, the California Environmental Protection Agency received the "Report of the 90-day External Program Review of California's Toxic Substances Control Program" ("Report").[21] Among other recommendations, the Report proposed that the Department "develop regulations where classification under 22 CCR 66261.24(a)(8) [formerly 66696(a)(6)] . . . [will have] broad application."[22] The legislative staff bill analysis makes clear that Health and Safety Code section 25141.5 "is designed to implement a recommendation of Cal EPA's 90-Day External Review of DTSC."[23] Specifically, the report noted that

> "Under the narrative characteristic of CCR §66261.24(a)(8), the Department may classify a waste as hazardous if it 'has been shown through experience or testing to pose a hazard to human health or environment because of its carcinogenicity, acute toxicity, chronic toxicity, bioaccumulative properties or persistence in the environment.' While the Department currently classifies only generator-specific waste under this provision, the classifications often have broad application to the wastes of many generators.
>
> "The classification of ethylene glycol and crystalline silica are two examples of the Department's use of this classification provision. [Discussion of ethylene glycol omitted.] The Department . . .

> classified a generator's waste as hazardous based on the presence of crystalline free silica. The Department subsequently set a nonhazardous threshold for this waste based on particle size, particle fragility, and concentration of free crystalline silica."[24]

The Report explains why it recommends requiring a rulemaking in order to classify chemicals under section 66261.24(a)(8):

> "In both of the examples . . . , the Department's action had broad application beyond the single generator. Following these determinations, generators have been concerned that the Department's decisions will be applied to their wastes, without the opportunity for the impacted generators to provide input to the Department. If the Department has sufficient information to classify a single generator's waste as hazardous or nonhazardous under 66261,24(a)(8) [sic], the Department should offer clarification to the regulated community by adopting these decisions as classification regulations."[25]

The Report did not discuss the requirements of the APA or the implications of Government Code section 11340.5, but, as cited above, it did provide a compelling rationale for the "underground regulation" prohibition of the APA.

In the floor statement supporting the bill enacting Health and Safety Code section 25141.5, the author noted that the bill relied on the Report's recommendation and repeated its examples. No one seems to have considered or discussed at exactly what point in the process the APA and the proposed statute would require adopting the Department's determinations as regulations.

Other Statutory Background

Two other statutory provisions are essential to understanding whether the Department followed the correct procedure. Health and Safety Code section 25143, enacted in 1977, allows the Department to grant variances from otherwise applicable requirements for managing a hazardous waste under specified conditions. Section 25143, although amended several

times, has consistently allowed the Department and its predecessors the authority to grant such variances.

Finally, section 25143.5, enacted in 1984 and amended in 1988, 1989, and 1991, creates an exemption which applies under specified circumstances. As in effect at the time of the rice hull ash classification, the action which is the subject of this determination request, section 25143.5 provided:

> "(a) Except as provided in subdivisions (d) and (e), the department shall classify as nonhazardous waste any fly ash, bottom ash, and flue gas emission control residues, generated from the combustion of solid waste or biomass material, if these wastes do not contain significant quantities of industrial sludge or hazardous waste, and if the combustion of the solid waste or biomass material will be adequately monitored and controlled so as to prevent the handling or the disposal of any waste in a manner prohibited by law, *unless the department determines that the ash or residue is hazardous, by testing a representative sample of the ash or residue pursuant to criteria adopted by the department.*"[26] (Emphasis added.)

Regulatory Framework:

At the time of this action, the Department of Health Services had an extensive regulatory structure governing the management of hazardous wastes. Provisions regarding the classification of substances as hazardous wastes were in Title 22 of the California Code of Regulations ("CCR"), mainly at sections 66300, 66680, and Article 11, "Criteria for Identification of Hazardous and Extremely Hazardous Wastes," section 66693 *et seq.*

At the time of the disputed classification, section 66693 provided:

> "Any waste which is hazardous pursuant to any of the criteria set forth in this article [11] is a hazardous waste and shall be managed in accordance with the provisions of this chapter [Chapter 30, "Minimum Standards for Management of

Hazardous and Extremely Hazardous Wastes"]."[27]

Section 66696, Title 22, CCR, entitled "Toxicity Criteria," provided in part:

"(a) A waste, or a material, is toxic and hazardous if it:
" . . .
"(6) Has been shown through experience or testing to pose a hazard to human health or environment because of its carcinogenity, acute toxicity, chronic toxicity, bioaccumulative properties or persistence in the environment;
. . . . "[28]

The Request for Determination

The Department described the factual background of this proceeding as follows:

"Wadham [Wadham Energy Company, Inc., the requester] operates a biomass electrical co-generation facility ('Facility') near the town of Williams in Colusa County, California. The Facility burns rice hulls as a source of energy to generate electricity. The ash resulting from the burning of rice hulls contains a large concentration of crystalline silica (SiO_2).

"On November 13, 1989, after collecting samples from the ash piles at the Facility and performing the proper tests, the Department determined that the ash produced at the Wadham facility was a hazardous waste because the ash contained high concentrations of 'respirable' crystalline silica. On May 2, 1990, the Department rejected Wadham's request for concurrence and classified the ash as a hazardous waste. *In the May 2, 1990 determination, the Department acknowledged that only a small percentage of the crystalline silica in the ash was 'respirable,' but determined that the fragile nature of the crystalline silica crystals would cause a very large percentage of the non-respirable crystals to break into 'respirable' sized crystals during handling.* (Emphasis added.)

"After making modifications to the Facility, Wadham made a request for concurrence from the Department that the ash was nonhazardous. On July 8, 1991, the Department concurred with Wadham that the ash produced after the modifications was nonhazardous. (Ash produced after September 1990).

"On January 16, 1992, the Department rejected Wadham's request for concurrence that the ash produced prior to the facility modifications was nonhazardous. To this date, ash produced prior to the plant modifications (Ash produced prior to September, 1990 [sic]) is stock piled at the Wadham facility awaiting resolution of this matter.

"On November 13, 1992, the Department specified that the nonhazardous classification was conditional on the ash being handled in a manner which prevented the 'respirable' crystalline silica from becoming airborne."[29]

On July 9, 1990, the Wadham Energy Company, Inc., Association ("Wadham") filed this Request for Determination, alleging:

"On May 2, 1990, the Department issued a decision classifying rice hull ash as a hazardous waste subject to regulation under the Hazardous Waste Control Law ('HWCL'), Cal. Health & Safety Code §§ 25100 *et seq.* . . . The Department based its decision solely upon the presence at any concentration of common silica in the ash. Yet the Department has never promulgated any regulation finding silica in any form to be hazardous.

"The Department's *ad hoc* finding that silica is a hazardous material constitutes a 'standard of general application' that should have been promulgated pursuant to the APA. The HWCL makes clear that the California Legislature intended the Department to promulgate specific standards as regulations before finding ash such as Wadham's to be hazardous."[30]

OAL must resolve whether the Department's finding indeed constitutes an "underground regulation."

Department's Response to Request for Regulatory Determination

As we will discuss more fully below, the Department argues (1) that its express authority to classify substances as hazardous waste "removes [its] determination from the requirements of the APA;[31] (2) that the 1991 case *Liquid Chemical Corporation v. Department of Health Services*[32] found that the classification of waste as hazardous is not subject to the requirements of the APA; and (3) that Wadham misconstrues Health and Safety Code section 25143.5 when it claims that section 25143.5 requires the Department to follow the APA when it classifies a substance as hazardous.

III. DISCUSSION

Key Issues Regarding the Determination

A. Whether the APA is generally applicable to the Department's quasi-legislative enactments.

B. Whether the challenged action constitutes a "regulation" within the meaning of the key provision of Government Code section 11342(g).

C. Whether any challenged action found to constitute a "regulation" is exempted by statute from compliance with APA requirements.

A.

The APA is generally applicable to the Department's quasi-legislative enactments.

Government Code section 11000 states in part:

"As used in this title [Title 2, 'Government of the State of

> California'] '*state agency' includes every state* office, officer, *department*, division, bureau, board, and commission." (Emphasis added.)

This statutory definition applies to the APA. It helps us determine whether or not a particular "state agency" is subject to APA rulemaking requirements. Section 11000 is contained in Title 2, Division 3 ("Executive Department"), Part 1 ("State Departments and Agencies"), Chapter 1 ("State Agencies") of the Government Code. The rulemaking portion of the APA is also found in Title 2 of the Government Code (at Chapter 3.5 of Part 1 of Division 3).

The Department is clearly a "state agency" as that term is defined in Government Code section 11000.

The APA somewhat narrows the broad definition of "state agency" given in Government Code section 11000. That is, Government Code section 11342, subdivision (g), of the APA provides that the term "state agency" applies to *all* state agencies, *except* those in the "judicial or legislative departments."[33] Since the Department is not in the judicial or legislative branch of state government, we conclude that APA rulemaking requirements generally apply to its quasi-legislative enactments.[34]

Further, Health and Safety Code section 25106, part of the HWCL, explicitly states

> "Except as expressly provided by statute, this chapter[35] does not supersede or modify Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code."[36]

Thus, the APA applies generally to the Department's rulemaking activities unless a particular statute governing particular, limited circumstances expressly provides otherwise.

B.

Does the challenged action constitute a "regulation" within the meaning of the key provision of Government Code section 11342(g)?

In part, Government Code Section 11342, subdivision (g), defines "regulation" as:

> ". . . *every* rule, regulation, order, or standard of general application or the amendment, supplement or revision of *any* rule, regulation, order or standard adopted by *any* state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, ... " (Emphasis added.)

Government Code section 11340.5, authorizing OAL to determine whether or not agency rules are "regulations," provides in part:

> "(a) *No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a ['']regulation['']* as defined in subdivision (g) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction [or] . . . standard of general application . . . has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA] . . . ." (Emphasis added.)

In *Grier v. Kizer*,[37] the California Court of Appeal upheld OAL's two-part test as to whether a challenged agency rule is a "regulation" as defined in the key provision of Government Code section 11342, subdivision (g):

First, is the challenged rule either

- a rule or standard of general application *or*
- a modification or supplement to such a rule?

Second, has the agency adopted the challenged rule to either

- implement, interpret, or make specific the law enforced or administered by the agency *or*

- govern the agency's procedure?

If an uncodified rule fails to satisfy either of the above two parts of the test, we must conclude that it is *not* a "regulation" and *not* subject to the APA. In applying this two-part test, however, we are mindful of the admonition of the *Grier* court:

> ". . . because the Legislature adopted the APA to give interested persons the opportunity to provide input on proposed regulatory action (*Armistead*, *supra*, 22 Cal.3d at p. 204, 149 Cal. Rptr. 1, 583 P.2d 744), we are of the view that *any doubt as to the applicability of the APA's requirements should be resolved in favor of the APA*." (Emphasis added.)[38]

Three subsequent California Court of Appeal cases provide additional guidance on the proper approach to take when assessing claims that agency rules are *not* subject to the APA.

According to *Engelmann v. State Board of Education* (1991), agencies need not adopt as regulations those rules contained in "'a statutory scheme which the Legislature has [already] established. . . .'"[39] But

> "to the extent that any of the [agency rules] depart from, or embellish upon, express statutory authorization and language, the [agency] will need to promulgate regulations. . . ."[40]

Similarly, agency rules properly promulgated *as regulations* (i.e., California Code of Regulations provisions) cannot legally be "embellished upon" in administrative bulletins. For example, in turn, *Union of American Physicians and Dentists v. Kizer* (1990)[41] held that a terse 24-word definition of "intermediate physician service" in a Medi-Cal regulation could not legally be supplemented by a lengthy seven-paragraph passage in an administrative bulletin that went "far beyond" the text of the

duly adopted regulation.[42] Statutes may legally be amended only through the legislative process; duly adopted regulations--generally speaking--may legally be amended only through the APA rulemaking process.

The third case, *State Water Resources Control Board v. Office of Administrative Law (Bay Planning Coalition)* ("*SWRCB v. OAL*") (1993), made clear that reviewing authorities focus on the *content* of the challenged agency rule, not the *label* placed on the rule by the agency:

> " . . . the . . . Government Code [is] careful to provide OAL authority over regulatory measures whether or not they are designated 'regulations' by the relevant agency. In other words, *if it looks like a regulation, reads like a regulation, and acts like a regulation, it will be treated as a regulation whether or not the agency in question so labeled it. . . .*" (Emphasis added.)[43]

Thus, we will first analyze whether the challenged rule is a standard of general application or a modification or supplement to such rule or standard; and secondly, whether the challenged rule (1) interprets, implements, or makes specific the law enforced or administered by the agency, or (2) governs the agency's procedure.

For an agency rule or standard to be "of general application" within the meaning of the APA, it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind or order.[44]

First, is the challenged rule either

- **a rule or standard of general application *or***
- **a modification or supplement to such a rule?**

Wadham Energy Company burns rice hulls to generate electricity at its biomass electrical co-generation facility. The process produces as waste rice hull ash containing high concentrations of crystalline silica (SiO_2). The Department has classified some of the resulting ash as hazardous and some as non-hazardous conditional upon certain precautions in handling.[45] The Department based its finding of hazard on scientific studies and tests

which show a link between exposure to respirable crystalline silica and an increased incidence of cancer.[46]

For the purpose of our analysis, we will assume that the scientific studies support the Department's finding. In other words, assuming that the *facts* support the Department's action, was the Department required to adopt a regulation before it classified the rice hull ash containing silica as hazardous, or could it base the classification on a combination of statutes and existing properly adopted regulations concerning the classification and characteristics of hazardous wastes?

The Department Classified Wadham's Rice Hull Ash as a Hazardous Waste:

In 1990, in its "Conclusions/Recommendations," the Department concluded, after sampling, analysis, and review, that

> "The ash generated by the Wadham facility is a low carbon ash containing a high percentage of free crystalline silica. The data provided indicates that a portion of this free silica is respirable, and that more of the remainder, under normal handling conditions, could become respirable. Inhalation of free crystalline silica may cause or contribute to the development of silicosis or cancer."[47]

The Department repeated the definition of "hazardous waste" (Health and Safety Code section 25117) and continued

> "Title 22, CCR, Section 66696(a)(6) [now section 66261.24(a)(8)] states that a waste or a material is toxic and hazardous if it
>
> > "'Has been shown through experience or testing to pose a hazard to human health or environment because of its carcinogenicity, acute toxicity, chronic toxicity, bioaccumulative properties or persistence in the environment.'[48]
>
> "The Wadham ash conforms to the definition of hazardous waste in Section 25117, HSC [Health and Safety Code], because free

> crystalline silica may cause, or significantly contribute to [,] an increase in mortality or an increase in serious irreversible illness."

In the Discussion section of the "Conclusions/Recommendations" document, the Department notes that

> "The Wadham Energy Company has evidently acknowledged that its ash poses a hazard in its letter of June 16, 1989, warning of the dangers associated with silica exposure and urging that everyone coming into contact with the ash be properly protected. Wadham's MSDS [Material Safety Data Sheet] indicates that the rice hull ash presents an inhalation hazard. It further identifies silicosis as the chronic effect of exposure, and recommends respiratory protection."[49]

The Department's Modified the Original Hazardous Waste Classification:

On November 13, 1992, the Department issued its "Concurrence with Nonhazardous Classification of Rice Hull Ash from Wadham Energy Company," finding that the ash was nonhazardous *"contingent upon the conditions specified at the end of this letter."*[50]

In the pivotal section entitled "Conclusion and Risk Management Decision," the Department states, among other things,

> "This determination is dependent upon the accuracy and representativeness of the data and information presented, and upon the validity and applicability of the risk assessment and risk management techniques used. If, for any reason, the characteristics of the ash significantly change or are found to be different such that the data and information presented to the Department for this determination no longer describe the characteristics of the ash, Wadham will be required to reassess its ash. In addition, if methods to assess risk change to allow for a more accurate estimation if the risk posed by the ash, Wadham will be required to reassess its ash.

"Information and data which are available pertaining to the adverse health effects of crystalline silica are still limited. The results of additional studies are likely to be available soon or in the near future. **The Department will continue to evaluate the available data and will, within one year of the date of this letter, re-evaluate this determination in light of any additional information which may become available within that time frame.** [Bold in original.] If the results of any new studies do not support the conclusions and decision made by the Department today, or if information is discovered which indicates that a different pathway is of concern, or that a more sensitive receptor species may be at risk, this decision will be amended as appropriate.

. . .

"Reference to the identified unit risk values in the assessment of risk was in light of the limitations associated with them. The use of these values in this waste determination is not intended to imply these values are accurate, nor that they should be used in other assessments of risk. *The uncertainties stated in this letter, along with the conclusions drawn from the risk assessment, are limited to this waste determination alone.*"[51] (Emphasis added.)

Wadham's Request for Determination: the Department Violated the APA when it Classified Rice Hull Ash as Hazardous:

Wadham alleges that the Department violated the APA when it classified the ash as hazardous because (1) Wadham's rice hull ash is "clearly subject to the statutory exemption in Health & Safety Code § 25143.5;" (2) "DHS has not adopted regulations that would take the ash outside the scope of the exemption," (3) "nor is there anything in DHS's existing regulations to indicate that the ash should be considered hazardous."[52]

Wadham also notes that silica is not listed among the nearly 800 chemicals identified in regulation as potentially hazardous. "Nor does the ash from Wadham's Facility present any other potentially significant hazardous characteristics."[53] Wadham concludes that

> "The Legislature has made it clear . . . that this general definition [Health & Safety Code section 25117] is not applicable to ashes from facilities like Wadham's.
>
> "Health & Safety Code § 25143.5 absolutely prohibits the Department from classifying such ashes as hazardous, regardless of other provisions of the HWCL, unless it does so pursuant to regulatory criteria adopted specifically for that purpose. The Department did not apply formally adopted regulatory criteria in its May 2 Decision. Instead, it applied informal criteria that have never been properly issued as regulations."[54]

Wadham notes that the added costs and limitations in handling the ash are not limited to Wadham but may affect many firms in various industries which may generate waste with a substantial silica content.

> "If rice hull ash must be classified as a hazardous waste because of its silica content, then all of these other wastes must also be classified as hazardous waste. In fact, the Department is currently considering the classification of fluid cracking catalyst ("FCC") waste fines from petroleum refining operations as hazardous based on their silica content. [Reference to attachment omitted]."[55]

Wadham argues that the classification decision "embodies rules or standards of general application."[56]

> "While the Department's decision purports to be limited to Wadham's ash, the standards it embodies are not. . . .
>
> "The determination that any amount of crystalline silica . . . renders a waste hazardous constitutes general standards [sic] which clearly will guide the Department's decision-making in other cases. The Department has already made clear that it will apply these standards in evaluating wastes in at least one other situation (FCC catalytic fines). [Citation to attachment omitted]. OAL should presume that the Department will apply the same standards to still

> other silica-containing wastes. See 1989 OAL Determination No. 1 [sic; actually no. 12] (Docket No. 88-D03 [sic; actually 88-003] (July 25, 1989) at 405."[57]

Wadham argues that the Department's Decision makes specific the law enforced by the Department, but focuses on the Department's implementation of Health and Safety Code section 25143.5, the "general exemption from regulation under the HWCL for ash from waste-to-energy facilities like Wadham's."[58] Wadham also maintains that the Decision misapplies then-section 66696(a), now section 66261.24(a), Title 22, CCR, describing the characteristic of toxicity.

Department's Response

One of the Department's strongest arguments appears in a document responding to a comment letter in support of the Request for Determination.[59] The Department stated:

> "When the Department adopted the regulations for the identification of hazardous waste, it was recognized that specific criteria and tests could not be identified for all possible wastes which might meet the statutory definition of hazardous waste. If the Department were limited to only those specific test methods and thresholds set forth in 22 CCR, wastes which pose recognized and substantial threats to human health and safety and the environment due to chronic toxicity, acute toxicity, environmental persistence and bioaccumulative properties may escape necessary regulation due to the inability of the Department to predict every possible combination of wastes. Section 66696(a)(6) [now 66261.24(a)(8)], 22 CCR was adopted in order to identify wastes which pose substantial threats to human health and the environment but for which specific criteria and testing procedures were not sufficiently standardized at the time this regulation was adopted, or for toxic substances which were not previously identified."

In its formal response, the Department argued that (1) its express authority to classify substances as hazardous waste "removes [its] determination from the requirements of the APA;[60] (2) the 1991 case

Liquid Chemical Corporation v. Department of Health Services[61] found that the classification of waste as hazardous is not subject to the requirements of the APA; and (3) Wadham misconstrues Health and Safety Code section 25143.5 when it claims that the statute requires the Department to follow the APA when it classifies a [particular] substance as hazardous.

In its Response, the Department summarized its modification of the initial determination that the rice hull ash was a hazardous waste. It continued:

> "Wadham . . . has failed to recognize that the Department's classification of ash containing 'respirable' crystalline silica as a hazardous waste is exempt from the provisions of the APA. The provisions of the APA are not applicable to an agency decision if an agency acts pursuant to a statute which does not require the agency to follow the requirements set forth in the APA. In the instant case, the Department is expressly granted the authority by statute to classify a waste without following the requirements contained within the APA. Accordingly, Wadham's request for regulatory determination is without merit and must be denied."[62]

None of the Department's arguments accurately expresses why the Department's conclusion--that its classification was *not* an "underground regulation"--is correct. However, the Department's conclusion *is* correct, as we will explain below.

DISCUSSION OF ARGUMENTS:

1. Health and Safety Code Section 25143.5

Wadham attempts to argue that its rice hull ash falls within the exemption provided for certain new technologies. Section 25143.5 exempts from classification as hazardous wastes certain products of "a biomass combustion process, as defined"

> " . . . *if* the combustion process will be adequately monitored and controlled so as to prevent the handling or the disposal of any waste in a manner prohibited by law, *unless the department determines*

> *that the ash or residue is hazardous, by testing a representative sample of the ash or residue pursuant to criteria adopted by the department.*" (Emphasis added.)

Wadham's ash may initially fall within the general description of wastes *exempted under certain circumstances*, but the Department *did* determine that the ash was hazardous, after testing representative samples pursuant to the criteria it adopted, specifically, the criterion of toxicity--then section 66696(a)(6), now section 66261.24(a)(8). Wadham argues that the Department classified the ash as hazardous by applying unadopted informal criteria, including a criterion that waste which contains silica *in any concentration* will be classified as hazardous. Wadham also emphasizes that the Department has not adopted criteria "specifically for that purpose."[63] Wadham repeats that

> "Health and Safety Code § 25143.5 absolutely prohibits the Department from classifying such ashes as hazardous, regardless of other provisions of the HWCL, unless it does so pursuant to regulatory criteria adopted *specifically for that purpose*. The Department did not apply formally adopted regulatory criteria in its May 2 Decision. Instead, it applied informal criteria that have never been properly issued as regulations."[64]

No matter how often the Requester repeats the modifying phrase "*specifically for that purpose*," section 25143.5 of the Health and Safety Code refers only to "criteria adopted by the Department." The Department applied the criteria it has adopted. It found that the rice hull ash generated under the circumstances at Wadham's facility met the definition of "hazardous waste"--specifically that it exhibited one of the "characteristics of hazardous waste identified in article 3 . . . ."[65] That characteristic was "toxicity" as set forth in section 66696(a)(6), now at section 66261.24(a)(8), Title 22, CCR.

Health and Safety Code section 25140 (unchanged since 1972) provides that the Department

> "shall prepare, adopt and may revise when appropriate, a listing of the wastes which are determined to be hazardous . . . "

and that it shall

> "develop and adopt by regulation *criteria and guidelines* for the identification of hazardous wastes . . . . " Health and Safety Code section 24141. (Emphasis added.)

The Department (and its predecessors) adopted the listings, revised them, and developed and adopted criteria such as that for toxicity (Section 66696(a)(6), now at section 66261.24(a)(8), Title 22, CCR). The Department continues to update the listings and revise the criteria and guidelines for identifying hazardous wastes.

Health and Safety Code section 25142, last amended by Statutes of 1988 (c. 1631),[66] indicates that the Legislature recognized that the Department could never list "for once and for all" every single substance which might be hazardous. Section 25142 provides that a waste which

> "conforms to a criterion adopted pursuant to Section 25141 shall be managed [as a hazardous waste] . . . or recycled [as specified] . . . *until the waste is cited in a list adopted by the department pursuant to Section 25140.*" (Emphasis added.)

As this section shows, the Legislature did not question that the Department will occasionally have to apply the regulatory criteria and guidelines to a substance not yet specifically listed, and that it will have to determine whether that substance is hazardous and must be handled as a hazardous waste *before* it is listed.

In 1992, the Legislature further addressed this issue by enacting Health and Safety Code section 25141.5 which requires that, when the Department classifies a waste as a hazardous waste pursuant to 22 CCR 66261.24(a)(8), it must incorporate that decision into a regulation

> "*if the department determines that the waste's classification as a hazardous waste is likely to have broad application beyond the producer who initiated the request.*" (Emphasis added.)

This statute was not in place when the Department made its rulings regarding silica, or at the time that Wadham requested this determination from OAL. Thus, we will not analyze the statute's impact in similar circumstances *after* its effective date.

On balance, we conclude that the Department's classification of rice hull ash containing silica, under the circumstances of the *Wadham* case, is the result of applying the statutes and regulations already in place.[67] The classification rests on the scientific studies cited in the Department's documents and notices to Wadham. A factual investigation of the Department's activities, and whether it applied (or applies) the rule in other cases, is outside the scope of OAL's duties.

Thus, at the time of classifying Wadham's rice hull ash as hazardous, under the narrowly defined circumstances and conditions, the challenged rule was not a rule of general application.

Does the challenged rule interpret, implement or make specific the law administered by the agency or govern the agency's procedure?

Both parties point out that Health and Safety Code section 25141

> "requires the Department to promulgate regulations and guidelines for identifying hazardous waste" and that
>
> "the regulations promulgated under the authority of § 25141 are set forth in 22 California Code of Regulations (CCR) 66261.1 *et seq.*"[68]

There can be no doubt that in determining that Wadham's waste was hazardous waste under specified conditions, the Department of Health Services was applying the law which it administered at the time, and which the Department of Toxic Substances Control now administers. The Department does not dispute that classifying the rice hull ash was "implementing" the law it administers; it argues that the existing statutes and regulations were sufficient in themselves, without additional regulatory action, to classify the rice hull ash as it did.

In this instance, the Department was "implementing" its law only by applying it to a particular set of facts and circumstances, not by creating a rule or standard of general application, as discussed above. The record does not demonstrate that the Department was attempting to exercise quasi-legislative power and create a rule of broad application.

Analysis under the two-part test leads us to conclude that the challenged classification was not a "regulation" within the meaning of the Government Code section 11342, subdivision (g).

C.

Does any challenged rule found to be a "regulation" fall within any established general exception to APA requirements?

Having determined that the Department's action does *not* constitute a rule of general application, and does *not* interpret, implement, or make specific the law the agency administers, except to the extent that it *carries out* that law, it is unnecessary to determine whether any exceptions to the APA apply. Thus, we need not discuss the Department's somewhat strained interpretation of the 1991 case *Liquid Chemical Corporation v. Department of Health Services.*[69]

The Department also claimed two exemptions from the APA: first, that its express authority to classify substances as hazardous waste "removes the Department's determination from the requirements of the APA"; and second, "that Wadham misconstrues Health and Safety Code Section 25143.5 when it claims that Section 25143.5 requires the Department to follow the APA when it classifies a substance as hazardous."[70]

We find that the Department must follow the requirements of the APA, unless expressly exempted, which it is not. See discussion of III.A., as to whether the APA is generally applicable to the Department's quasi-legislative enactments. In this instance, under the statutes and regulations applicable at the time, the Department did follow the requirements of the APA, and applied its properly adopted criteria to the particular case under review.

Secondly, Health and Safety Code section 25143.5 plainly requires the Department to adopt criteria to use when it determines whether particular ash or residue is hazardous. The Department is not exempt from the APA when it adopts these criteria. However, at the time of the Department's classification of Wadham's rice hull ash, it was not required to engage in a rulemaking following the APA to classify a *particular* substance as hazardous or as within the exception of section 25143.5.

Health and Safety Code section 25141.5, enacted in 1992, after Wadham submitted its request for determination, provides:

> "The department shall, when classifying a waste as hazardous pursuant to the criteria in paragraph (8) of subdivision (a) of Section 66261.24 of Title 22 of the California Code of Regulations, as that section read on January 1, 1993, incorporate the department's decision into a regulation, if the department determines that the waste's classification as a hazardous waste is likely to have broad application beyond the producer who initiated the request."[71]

The record of this request for determination proceeding does not contain facts which show that the Department *has* determined that its finding that "the [Wadham] ash was a hazardous waste because the ash contained high concentrations of 'respirable' crystalline silica"[72] is likely to have broad application beyond Wadham's facility. However, as discussed above, the Requester suggested that the Department would classify other wastes as hazardous based on their silica content.

If the Department is classifying other ash as hazardous waste because that ash contains high concentrations of crystalline silica, then it appears that the Department is giving the classification broad application beyond the producer, Wadham. Such a classification may suggest that the Department has made an implicit if not an express determination, thus invoking the section 25141.5 requirement to incorporate the Wadham classification into a regulation.

THE ISSUES PRESENTED[2]

The Office of Administrative Law ("OAL") has been asked to determine[3] whether, in classifying the Wadham Energy Company's rice hull ash containing silica as a hazardous waste pursuant to Health and Safety Code section 25117, the California Department of Toxic Substances Control ("Department"), formerly the Toxic Substances Control Program within the Department of Health Services, established a "regulation" required to be adopted pursuant to the Administrative Procedure Act ("APA").[4]

THE DECISION[5,6,7,8]

The Office of Administrative Law finds that:

(1) applicable law generally requires the Department to adopt its quasi-legislative enactments pursuant to the APA;

(2) at the time the Department classified Wadham's rice hull ash as hazardous, this departmental action ("the challenged rule") was a not a "regulation" within the meaning of the key provision of Government Code section 11342, subdivision (g);

(3) at the time the Department classified Wadham's rice hull ash as hazardous, the challenged rule did not violate Government Code section 11340.5, subdivision (a).[9]

(4) the record does not contain sufficient information for OAL to determine whether the requirements of Health and Safety Code section 25141.5 have been triggered.

IV. CONCLUSION

For the reasons set forth above, OAL finds that:

(1) the Department's quasi-legislative enactments are generally subject to the APA;

(2) at the time the Department classified Wadham's rice hull ash as hazardous, the challenged rule did not violate Government Code section 11340.5, subdivision (a).

(3) the record does not contain sufficient information for OAL to determine whether the requirements of Health and Safety Code section 25141.5 have been triggered.

DATE: November 1, 1996

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ENDNOTES

1. This Request for Determination ("Request") was filed by Wadham Energy Company, Inc., 2525 Saddleback Court, Santa Rosa, California, 95401. The Request concerned an decision of the Toxic Substances Control Program of the Department of Health Services. In 1991, pursuant to the Governor's Reorganization Plan No. 1 of 1991, responsibility for the hazardous waste management program was shifted to the Department of Toxic Substances Control. Therefore, references to "the Department" regarding activities before the transfer of responsibility in 1991 are to the Department of Health Services, while references to "the Department" after the 1991 transfer are to the Department of Toxic Substances Control. See also endnotes 13 and 16 for fuller history.

   The California Department of Toxic Substances Control was represented by Ramon B. Perez, Senior Staff Attorney, for James R. Cutright, Acting Chief Counsel, 400 P Street, Room 4480, Sacramento, California 95814. Wadham Energy Company, Inc. was represented by Kevin T. Haroff, Morrison & Foerster, Attorneys at Law, 345 California Street, San Francisco, California 94104-2675.

   To facilitate the indexing and compilation of determinations, OAL began, as of January 1, 1989, assigning consecutive page numbers to all determinations issued within each calendar year, e.g., the first page of this determination, as filed with the Secretary of State and as distributed in typewritten format by OAL, is "1." (*This* determination is the first published in 1996.) Different page numbers are necessarily assigned when each determination is later published in the California Regulatory Notice Register.

   This determination may be cited as "**1996 OAL Determination No. 1** (Department of Toxic Substances Control)."

2. The legal background of the regulatory determination process--including a survey of governing case law--is discussed at length in note 2 to **1986 OAL Determination No. 1** (Board of Chiropractic Examiners, April 9, 1986, Docket No. 85-001), California Administrative Notice Register 86, No. 16-Z, April 18, 1986, pp. B-14--B-16, typewritten version, notes pp. 1-4. See also *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, 249-250, review denied (APA was enacted to establish basic minimum procedural requirements for the adoption, amendment or repeal of state administrative regulations).

   In August 1989, a *second* survey of governing case law was published in **1989 OAL Determination No. 13** (Department of Rehabilitation, August 30, 1989, Docket No. 88-019), California Regulatory Notice Register 89, No. 37-Z, p. 2833, note 2. The second

survey included (1) five cases decided after April 1986 and (2) seven pre-1986 cases discovered by OAL after April 1986. Persuasive authority was also provided in the form of nine opinions of the California Attorney General which addressed the question of whether certain material was subject to APA rulemaking requirements.

In November 1990, a *third* survey of governing case law was published in **1990 OAL Determination No. 12** (Department of Finance, November 2, 1990, Docket No. 89-019 [printed as "89-020"]), California Regulatory Notice Register 90, No.46-Z, page 1693, note 2. The third survey included (1) five appellate court cases which were decided during 1989 and 1990, and (2) two California Attorney General opinions: one opinion issued before the enactment of Government Code section 11347.5, and the second opinion issued afterwards.

In January 1992, a *fourth* survey of governing case law was published in **1992 OAL Determination No. 1** (Department of Corrections, January 13, 1992, Docket No. 90-010), California Regulatory Notice Register 92, No. 4-Z, page 83, note 2. This fourth survey included two cases holding that government personnel rules could not be enforced unless duly adopted.

In December 1993, a *fifth* survey of governing law was published in **1993 OAL Determination No. 4** (State Personnel Board and Department of Justice, December 14, 1993, Docket No. 90-020), California Regulatory Notice Register 94, No. 2-Z, page 61, note 3.

In December 1994, a *sixth* survey of governing law was published in **1994 OAL Determination No. 1** (Department of Education, December 22, 1994, Docket No. 90-021), California Regulatory Notice Register 95, No. 3-Z, page 94, note 3.

Readers aware of additional judicial decisions concerning "underground regulations"--published or unpublished--are invited to furnish OAL's Regulatory Determinations Unit with a citation to the opinion and, if unpublished, a copy of the opinion. (Whenever a case is cited in a regulatory determination, the citation is reflected in the Determinations Index.) Readers are also encouraged to submit citations to Attorney General opinions addressing APA compliance issues.

3. Title 1, California Code of Regulations ("CCR") (formerly known as the "California Administrative Code"), subsection 121(a), provides:

> "'*Determination*' means a finding by OAL as to whether a state agency rule is a 'regulation,' as defined in Government Code section 11342(g), which is *invalid and unenforceable* unless
>
> > (1) it has been adopted as a regulation and filed with the Secretary of State pursuant to the APA, or,

(2) it has been exempted by statute from the requirements of the APA." (Emphasis added.)

See *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, review denied (finding that Department of Health Services' audit method was *invalid and unenforceable* because it was an underground regulation which should be adopted pursuant to the APA); and *Planned Parenthood Affiliates of California v. Swoap* (1985) 173 Cal.App.3d 1187, 1195, n. 11, 219 Cal.Rptr. 664, 673, n. 11 (citing Gov. Code sec. 11347.5 (now 11340.5) in support of finding that uncodified agency rule which constituted a "regulation" under Gov. Code sec. 11342, subd. (b)--now subd. (g)-- yet had not been adopted pursuant to the APA, was "*invalid*").

4. According to Government Code section 11370:

"*Chapter 3.5* (commencing with Section 11340), *Chapter 4* (commencing with Section 11370) *and Chapter 5* (commencing with Section 11500) *constitute*, and may be cited as, *the Administrative Procedure Act*." (Emphasis added.)

We refer to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Office of Administrative Law") of Division 3 of Title 2 of the Government Code, sections 11340 through 11356.

The rulemaking portion of the APA and all OAL regulations are reprinted and indexed in the annual APA/OAL regulations booklet "**California Rulemaking Law**," which is available from OAL (916-323-6225). The January 1996 revision is $3.50 ($6.40 if sent U.S. Mail).

5. *OAL Determinations Entitled to Great Weight In Court*

The California Court of Appeal has held that a statistical extrapolation rule utilized by the Department of Health Services in Medi-Cal audits must be adopted pursuant to the APA. *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244. Prior to this court decision, OAL had been asked to determine whether or not this Medi-Cal audit rule met the definition of "regulation" as found in Government Code section 11342, subdivision (b) (now subd. (g)), and therefore was required to be adopted pursuant to the APA. Pursuant to Government Code section 11347.5 (now 11340.5), OAL issued a determination concluding that the audit rule did meet the definition of "regulation," and therefore was subject to APA requirements. **1987 OAL Determination No. 10** (Department of Health Services, Docket No. 86-016, August 6, 1987). The *Grier* court concurred with OAL's conclusion, stating that the

"Review of [the trial court's] decision is a question of law for this court's independent determination, namely, whether the Department's use of an audit

> method based on probability sampling and statistical extrapolation constitutes a regulation within the meaning of section 11342, subdivision (b) (now subd. (g)). [Citations.]" (219 Cal.App.3d at p. 434, 268 Cal.Rptr. at p. 251.)

Concerning the treatment of **1987 OAL Determination No. 10**, which was submitted to the court for consideration in the case, the court further found:

> "While the issue ultimately is one of law for this court, 'the contemporaneous administrative construction of a statute by those charged with its enforcement and interpretation is *entitled to great weight*, and courts generally will not depart from such construction unless it is clearly erroneous or unauthorized. [Citations.]' [Citations.] [Par.] Because [Government Code] section 11347.5 (now 11340.5), subdivision (b), charges the OAL with interpreting whether an agency rule is a regulation as defined in [Government Code] section 11342, subdivision (b) (now subd. (g), *we accord its determination due consideration.*" (Id.; emphasis added.)

The court also ruled that OAL's Determination, that "the audit technique had not been duly adopted as a regulation pursuant to the APA, . . . [and therefore] deemed it to be an invalid and unenforceable 'underground' regulation," was "*entitled to due deference.*" (Emphasis added.)

Other reasons for according "due deference" to OAL determinations are discussed in note 5 of **1990 OAL Determination No. 4** (Board of Registration for Professional Engineers and Land Surveyors, February 14, 1990, Docket No. 89-010), California Regulatory Notice Register 90, No. 10-Z, March 9, 1990, p. 384.

6. *Note Concerning Comments and Responses*

In order to obtain full presentation of contrasting viewpoints, we encourage not only affected rulemaking agencies but also all interested parties to submit written comments on pending requests for regulatory determination. (See Title 1, CCR, sections 124 and 125.) The comment submitted by the affected agency is referred to as the "Response."

If the affected agency concludes that part or all of the challenged rule is in fact an "underground regulation," it would be helpful, if circumstances permit, for the agency to concede that point and to permit OAL to devote its resources to analysis of truly contested issues.

7. If an uncodified agency rule is found to violate Government Code section 11340.5, subdivision (a), the rule in question may be validated by formal adoption "as a *regulation*" (Government Code section 11340.5, subd. (b); emphasis added) or by incorporation in a statutory or constitutional provision. See also *California Coastal Commission v. Quanta Investment Corporation* (1980) 113 Cal.App.3d 579, 170 Cal.Rptr. 263 (appellate court authoritatively construed statute, validating challenged

agency interpretation of statute.) Of course, an agency rule found to violate the APA could also simply be rescinded.

8. Pursuant to Title 1, CCR, section 127, this Determination shall become effective on the 30th day after filing with the Secretary of State. This Determination was filed with the Secretary of State on the date shown on the first page of this Determination.

9. Government Code section 11340.5 provides:

> "(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in subdivision (g) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter.
>
> "(b) If the office is notified of, or on its own, learns of the issuance, enforcement of, or use of, an agency guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule that has not been adopted as a regulation and filed with the Secretary of State pursuant to this chapter, the office may issue a determination as to whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, is a regulation as defined in subdivision (g) of Section 11342.
>
> "(c) The office shall do all of the following:
>
> "1. File its determination upon issuance with the Secretary of State.
>
> "2. Make its determination known to the agency, the Governor, and the Legislature.
>
> "3. Publish its determination in the California Regulatory Notice Register within 15 days of the date of issuance.
>
> "4. Make its determination available to the public and the courts.
>
> "(d) Any interested person may obtain judicial review of a given determination by filing a written petition requesting that the determination of the office be modified or set aside. A petition shall be

filed with the court within 30 days of the date the determination is published.

"(e) A determination issued by the office pursuant to this section shall not be considered by a court, or by an administrative agency in an adjudicatory proceeding if all of the following occurs:

"1. The court or administrative agency proceeding involves the party that sought the determination from the office.

"2. The proceeding began prior to the party's request for the office's determination.

"3. At issue in the proceeding is the question of whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which is the legal basis for the adjudicatory action is a regulation as defined in subdivision (g) of Section 11342." (Emphasis added.)

10. *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, 249-250, review denied.

11. *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 431, 268 Cal.Rptr. 244, 249, review denied.

12. Statutes 1972, Chapter 1236, added Chapter 6.5, Hazardous Waste Control, to Division 20 of the California Health and Safety Code.

13. In 1971, Statutes of 1971, Chapter 1593, section 56, operative July 1, 1973, designated the State Department of Public Health as the State Department of Health. In 1977, it was designated the State Department of Health Services (Statutes of 1977, Chapter 1252, section 109, operative July 1, 1978).

14. As enacted in 1972, the Hazardous Waste Control Act provided:

"The Legislature finds that increasing quantities of hazardous waste are being generated in the state and that without adequate safeguards for handling and disposal, such wastes can create conditions which threaten the public health and safety and create hazards to wildlife." Section 25100, Health and Safety Code.

"The Legislature therefore declares that in order to prevent such hazardous conditions it is in the public interest to establish regulations and to maintain a program to provide for the safe handling and disposal of hazardous wastes." Section 25101, Health and Safety Code.

15. Excerpt from Health and Safety Code section 25101, added by Statutes 1982, Chapter 89.

16. Pursuant to Government Code section 12080.5, the Governor's Reorganization Plan No. 1 of 1991, "State government reorganization: environmental protection," became effective on July 17, 1991. The plan transferred responsibility for continuing to implement the Hazardous Waste Control Law to the new Department, changing the definition of "Department" from the "State Department of Health Services" to the "Department of Toxic Substances Control," (section 100, amending Health and Safety Code section 25111), and "Director" from the "State Director of Health Services" to the "Director of Toxic Substances Control," (section 101 amending Health and Safety Code section 25112). The plan made further appropriate conforming changes to distinguish the responsibilities of the various departments with environmental duties.

The 1994-1995 Governor's Budget summarizes the Department's objectives as

> "The Department of Toxic Substances Control protects public health and the environment by (a) regulating hazardous waste management activities, (b) overseeing or performing cleanup activities at sites contaminated with hazardous substances, (c) encouraging pollution prevention and the development of environmental protection technologies and (d) providing regulatory assistance and public education." Item 3960 at page EP 33, Governor's Budget for the 1994-1995 fiscal year.

17. *OAL does not review alleged underground regulations for compliance with APA's six substantive standards*

We discuss the affected agency's rulemaking authority--(see Gov. Code, section 11349, subd. (b)-- in the context of reviewing a Request for Determination for the purposes of exploring the context of the dispute and of attempting to ascertain whether or not the agency's rulemaking statute expressly requires APA compliance. (Of course, as discussed in the text of the determination, the APA itself applies to all Executive Branch agencies, absent an express statutory *exemption*.) If the affected agency should later elect to submit for OAL review a regulation proposed for inclusion in the California Code of Regulations, OAL will, pursuant to Government Code section 11349.1, subdivision (a), review the proposed regulation in light of the APA's procedural and substantive requirements.

The APA requires all proposed regulations to meet the six substantive standards of Necessity, Authority, Clarity, Consistency, Reference, and Nonduplication. OAL *does not* review alleged "underground regulations" to determine whether or not they meet the six substantive standards applicable to regulations proposed for formal adoption.

The question of whether the challenged rule would pass muster under the six substantive standards need not be decided until such a regulatory filing is submitted to us under Government Code section 11349.1, subdivision (a). At that time, OAL will carefully review the filing to ensure that it fully complies with all applicable legal requirements.

Comments from the public are very helpful to us in our review of proposed regulations. We encourage any person who detects any sort of legal deficiency in a proposed regulation to file comments with the rulemaking agency during the 45-day public comment period. (Only persons who have formally requested notice of proposed regulatory actions *from a specific rulemaking agency* will be mailed copies of that specific agency's rulemaking notices.) Such public comments may lead the rulemaking agency to modify the proposed regulation.

If review of a duly filed public comment leads us to conclude that a regulation submitted to OAL does not in fact satisfy an APA requirement, OAL will disapprove the regulation. (Gov. Code, sec. 11349.1.)

18. Statutes of 1977, Chapter 1039, section 13, added section 25141 to the Health and Safety Code, effective January 1, 1978. Statutes of 1995, Chapter 638, section 3, amended section 25141, but left subdivision (a), as quoted in full in the text, unchanged.

19. Health and Safety Code section 25140 provides in full:

> "The department shall prepare, adopt and may revise when appropriate, a listing of the wastes which are determined to be hazardous, and a listing of the wastes which are determined to be extremely hazardous. When identifying such wastes the department shall consider, but not be limited to, the immediate or persistent toxic effects to man and wildlife and the resistance to natural degradation or detoxification of the wastes."

As noted above, the Legislature first enacted this provision as part of the Hazardous Waste Control Law in 1972, directing the Department of Public Health (at that time) to implement the Act. Although the meaning of "department" has shifted from Public Health to Health to Health Services to Toxic Substances Control, the text of this provision has remained unchanged through the present.

See below for discussion of the regulatory framework.

20. Added by Chapter 1058, Statutes of 1992, operative January 1, 1993 (amended Statutes 1995, c. 638).

This statute refers to section 66261.24(a)(8), Title 22, CCR, which appears in Article 3 ("Characteristics of Hazardous Waste") of Chapter 11 ("Identification and Listing of Hazardous Waste") of Division 4.5 entitled "Environmental Health Standards for the Management of Hazardous Waste" in Title 22. Section 66261.1 describes the purpose and scope of the chapter as identifying "those wastes which are subject to regulation as hazardous wastes under this division and are subject to the notification requirements of Health and Safety Code section 25153.6." Section 66261.24, derived from the former

section 66696(a)(6), lists the "Characteristic of Toxicity" as follows:

> "(a) A waste exhibits the characteristic of toxicity if representative samples of the waste have any of the following properties:
>
> . . .
>
> "(8) it has been shown through experience or testing to pose a hazard to human health or environment because of its carcinogenicity, acute toxicity, chronic toxicity, bioaccumulative properties or persistence in the environment."

21. This Report was prepared for the California EPA by the California Waste Classification Treatment Standards and Planning Task Force, Mark Hopkins, Chairperson. The final version was dated December 20, 1991.

22. Report, page 1-18.

23. Assembly Third Reading Analysis, 8/21/92.

24. Report, pages 1-17 and 1-18.

25. Report, page 1-19.

26. Section 25143.5 was added by Statutes of 1984, Chapter 1160, section 2; amended by Statutes of 1988, Chapter 1631, section 15; amended by Statutes of 1989, Chapter 1436, section 15; and amended by Statutes of 1991, Chapter 1218, section 2.

The most recent amendment in 1991 provided:

> "(a) Except as provided in subdivisions (d) and (e), the department shall classify as nonhazardous waste any fly ash, bottom ash, and flue gas emission control residues, generated from a biomass combustion process, as defined in subdivision (f), if the combustion process will be adequately monitored and controlled so as to prevent the handling or the disposal of any waste in a manner prohibited by law, *unless the department determines that the ash or residue is hazardous, by testing a representative sample of the ash or residue pursuant to criteria adopted by the department.*" (Emphasis added.)

The emphasized provision remains unchanged.

27. Section 66300, Title 22, CCR, provided that, with specified exceptions, Chapter 30 applied to

> "(a) . . .
> "(1) Waste which is hazardous pursuant to any criterion in Article 11 of this chapter . . . . "

Section 66305 provided that

> "(a) A waste must be classified as a hazardous waste if it is within the scope of Section 66300 and
> "(1) it is hazardous pursuant to any criterion of Article 11, or
> "(2) it otherwise meets the definition of a hazardous waste in Section 25117 of the Health and Safety Code, ... "

In 1991, these provisions were replaced and the Department of Toxic Substances Control adopted Chapter 11, Division 4, Environmental Health, entitled "Identification and Listing of Hazardous Waste."

Section 66261.3 (in article 1 of Chapter 11) defines a hazardous waste as one which, among several alternatives, "exhibits any of the characteristics of hazardous waste identified in article 3 of this chapter . . . . "

28. In 1991, this provision was repealed. The Department of Toxic Substances Control then adopted Article 3, "Characteristics of Hazardous Waste," (Section 66261.20 *et seq.*) which now provides that

> "(a) A waste, as defined in section 66261.2, which is not excluded from regulation as a hazardous waste pursuant to section 66261.4(b), is a hazardous waste if it exhibits any of the characteristics identified in this article."

This article sets out the characteristics of ignitability, corrosivity, reactivity, and toxicity, as well as methods of measuring and detecting these characteristics. Most relevant to the instant determination is the characteristic of toxicity, section 66261.24(a)(8), which states:

> "(a) A waste exhibits the characteristic of toxicity if representative samples of the waste have any of the following properties:
>
> . . .
>
> "(8) it has been shown through experience or testing to pose a hazard to human health or environment because of its carcinogenicity, acute toxicity, chronic toxicity, bioaccumulative properties or persistence in the environment."

29. Agency Response to Request for Regulatory Determination ("Response"), pp. 2-4.

30. Request for Determination, p. 2.

31. Response, page 4.

32. (1991) 227 Cal.App.3d 1682, 279 Cal.Rptr. 103, referred to as "*Liquid Chemical.*"

33. Government Code section 11342, subdivision (a). See Government Code sections 11343, 11346 and 11340.5. See also *Auto and Trailer Parks*, 27 Ops.Cal.Atty.Gen. 56, 59 (1956). For a thorough discussion of the rationale for the "APA applies to all agencies" principle, see **1989 OAL Determination No. 4** (San Francisco Regional Water Quality Control Board and the State Water Resources Control Board, March 29, 1989, Docket No. 88-006), California Regulatory Notice Register 89, No. 16-Z, April 21, 1989, pp. 1026, 1051-1062; typewritten version, pp. 117-128.

1989 OAL Determination No. 4 was upheld by the California Court of Appeal in *State Water Resources Control Board v. Office of Administrative Law* (1993) 12 Cal.App.4th 697, 16 Cal.Rptr. 2d 25, rehearing denied, Feb. 19, 1993.

34. See *Winzler & Kelly v. Department of Industrial Relations* (1981) 121 Cal.App.3d 120, 126-128, 174 Cal.Rptr. 744, 746- 747 (unless "expressly" or "specifically" exempted, all state agencies not in legislative or judicial branch must comply with rulemaking part of APA when engaged in quasi-legislative activities); *Poschman v. Dumke* (1973) 31 Cal.App.3d 932, 943, 107 Cal.Rptr. 596, 603.

35. Chapter 6.5 of Division 20 of the Health and Safety Code, known as the Hazardous Waste Control Law ("HWCL").

36. These provisions are known as the rulemaking portion of the Administrative Procedure Act; see endnote 4.

37. (1990) 219 Cal.App.3d 422, 440, 268 Cal.Rptr. 244, 251.

38. *Supra*, 219 Cal.App.3d at 438, 268 Cal.Rptr. at 253.

39. 2 Cal.App.4th 47 at 62; 3 Cal.Rptr.2d 264 at 274.

40. *Id.* at 62; 3 Cal.Rptr.2d at 275.

41. 223 Cal.App.3d 490, 500, 272 Cal.Rptr. 886, 891.

42. *Id.*

43. (1993) 16 Cal. Rptr.2d 25 at 28.

44. *Roth v. Department of Veteran Affairs* (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552. See *Faulkner v. California Toll Bridge Authority* (1953) 40 Cal.2d 317, 323-324 (standard of general application applies to all members of any open class).

45. Specifically, the handling must prevent the respirable crystalline silica from becoming airborne.

46. Thus, the substance would meet the characteristic of "toxicity" of section 66261.24(a)(8). Further, the Department points out that respirable crystalline silica has been listed under Proposition 65 as a "substance known to the State to cause cancer or reproductive toxicity." 22 CCR § 12000.

47. Page 9, Classification of Rice Hull Ash dated May 2, 1990, attached to the Request as Exhibit "A."

48. The toxicity criterion set out at subdivision (a)(6) was repealed in 1991 and replaced by the nearly identical language of section 66261.24(a)(8), set out at endnote 20.

49. Page 8, Classification of Rice Hull Ash dated May 2, 1990, attached to the Request as Exhibit "A."

50. This 33-page Concurrence letter from the Department to Mr. Robert Ellery of the Wadham Energy Company contains an extensive background, chronology, analytical data, including risk assessment under various scenarios, various models, discussion of numerous variables, uncertainties, the risk management decision, conclusions and conditions, and a table of references.

51. Pages 22-24, November 13, 1992 Concurrence letter.

52. Page 5 of the Request for Regulatory Determination ("Request").

53. "Nor does the ash from Wadham's Facility present any other potentially significant hazardous characteristics." *Ibid.*

54. Pages 6-7, Request.

55. Page 8, Request.

56. Page 11, Request.

57. Pages 9-10, Request.

OAL Determination No. 12 concerns the "Request for Regulatory Determination filed by Stephen Arian, Esq. concerning the Board of Examiners in Veterinary Medicine's policy statement that the practice of veterinary medicine, surgery and dentistry includes the cleaning of animals' teeth."

Wadham is apparently directing our attention to the paragraph which rebuts the Board's contention that their policy statement is not a rule of general application because the Board "is merely exercising its adjudicatory power of applying the law to the facts of a particular case, i.e., on a case by case basis in response to a particular set of facts; and that the statement was issued to only three individuals."

OAL responded that it "did not agree with this argument by the Board. For an agency rule to be 'of general application' within the meaning of the APA, it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind, or order. The fact that the Board issued the statement to only three people does not lessen the effect or application of the rule on all members of the class, e.g. all *non*-veterinarians statewide who clean animals' teeth, except those permitted by Business and Professions Code section 4826 or exempt pursuant to section 4827. Such class members would be *significantly* affected in that they may be found in violation of section 4826 and therefore guilty of a misdemeanor, pursuant to section 4831 . . . . " Page 405, 1989 OAL Determination No. 12 (Board of Examiners in Veterinary Medicine, July 25, 1989, Docket No. 88-003).

The Board stated its position (that animal teeth cleaning is a preventive dental procedure governed by the dental licensing laws) flatly as a statement of policy in several letters which stated that to engage in the acts defined as teeth cleaning would be the basis for criminal proceedings. This statement of Board policy is distinguishable from the Department's extensive analysis of the facts and circumstances of the particular circumstances before it in a single case, in light of applicable statutes and regulations.

58. Page 11, Request.

59. Memorandum from the Department to the Office of Administrative Law dated August 20, 1990, regarding Chemical Manufacturers Association Comments on Wadham energy Company's Request for Regulatory Determination Regarding Silica Wastes (Docket Number 90-032)."

60. Page 4, Agency Response to Request for Regulatory Determination ("Response") filed July 30, 1993, pursuant to extension of time granted to re-direct invitation to respond to the correct agency (Department of Toxic Substances Control) rather than the Department of Health Services which had received the original Notice Concerning Agency Response.

61. (1991) 227 Cal.App.3d 1682, 279 Cal.Rptr. 103, referred to as "*Liquid Chemical.*"

62. Department's Response, page 2.

63. Page 4, Request for Determination. The full context is Wadham's statement that

> "The law [§ 25143.5] provides that the Department can classify the ash as hazardous if it does so "pursuant to criteria adopted by the Department" specifically for that purpose. To date, however, the Department has not formally adopted regulatory criteria in accordance with the statutory requirement. [Footnote regarding Department's regulations permitting classifying ash from the burning of biomass as "special wastes" omitted.]"

64. Pages 6-7, Request.

65. Section 66261.3(a)(2)(A), Title 22, CCR.

66. "[a]ny waste which conforms to a criterion adopted pursuant to Section 25141 shall be managed in accordance with permits, orders, and regulations issued or adopted by the department pursuant to this chapter [] . . . or recycled consistent with the list of hazardous wastes which the department, pursuant to Section 25175, finds are economically and technologically feasible to recycle, until the waste is cited in a list adopted by the department pursuant to Section 25140."

67. Most significantly, Health and Safety Code sections 25141 and 25142 and 22 CCR 66261.24.

68. Response, page 4.

69. (1991) 227 Cal.App.3d 1682, 279 Cal.Rptr. 103, referred to as "*Liquid Chemical.*"

70. Page 4, Response.

71. Added by Chapter 1058, Statutes of 1992, operative January 1, 1993 (amended Statutes 1995, c. 638).

This statute refers to section 66261.24(a)(8), Title 22, CCR, which appears in Article 3 ("Characteristics of Hazardous Waste") of Chapter 11 ("Identification and Listing of Hazardous Waste") of Division 4.5 entitled "Environmental Health Standards for the Management of Hazardous Waste" in Title 22. Section 66261.1 describes the purpose and scope of the chapter as identifying "those wastes which are subject to regulation as hazardous wastes under this division and are subject to the notification requirements of Health and Safety Code section 25153.6." Section 66261.24, derived from the former section 66696(a)(6), lists the "Characteristic of Toxicity" as follows:

> "(a) A waste exhibits the characteristic of toxicity if representative samples of the waste have any of the following properties:
>
> . . .
>
> "(8) it has been shown through experience or testing to pose a hazard to human health or environment because of its carcinogenicity, acute toxicity, chronic toxicity, bioaccumulative properties or persistence in the environment."

72. Department's Response, page 3.